Sabah Forest Industries Sdn Bhd & Anor v The Collector of Land Revenue & Ors and another application

HIGH COURT (KOTA KINABALU) — JUDICIAL REVIEW NOS BKI-25–36/12 OF 2022 AND BKI-25–5/1 OF 2022
AMELATI PARNELL JC
24 NOVEMBER 2023

Civil Procedure — Judicial review — Application for leave — Applicants filed judicial review in respect of notice of compulsory acquisition of lands by State Government — Whether second applicant had locus standi to bring action on behalf of first applicant — Whether there was arguable case and claims were not frivolous or vexatious — Whether applicants had not exhausted remedies under Land Acquisition Ordinance — Whether leave should be granted

Civil Procedure — Stay of proceedings — Application for — Applicants applied for stay of eviction notices issued by respondent directing applicants and occupants of lands to vacate lands — Whether stay application contained injunctive prayers or in nature of injunction against government — Whether stay application should be allowed

Several pieces of lands ('the lands') were alienated to the first applicant pursuant to a share sale agreement between the State Government of Sabah and Avenel Sdn Bhd, for the sale and purchase of equity in the first applicant ('the agreement'). The agreement led to the execution of a series of timber licence agreements by the State Government of Sabah and the first applicant. The first applicant then created a specific registered charge on the lands in favour of Maybank Trustees Bhd as well as a borrower fixed asset charge and a borrower current asset charge, and a second borrower fixed asset charge and a second borrower current asset charge ('asset charges'). In connection with the asset charges, the second applicant as the joint security agent, was appointed by Maybank Trustees Bhd to act as the receiver and manager of the fixed and current assets of the first applicant. In 2021, the timber licence agreements were terminated by the fourth respondent. The first applicant was also wound up by an order of the High Court and an official receiver was appointed. The second applicant wrote to the official receiver for consent to continue to act as the receiver and manager to initiate the proceedings pursuant to s 386(1)(c) of the Companies Act 2016 and the consent sought was granted. The State Government of Sabah later issued notifications of resuming the lands for public purpose and the Gazette notification for the lands were published. Hence, the applications for leave for judicial review filed by the applicants ('the leave

application'). Sometime in May 2023, eviction notices were issued under s 3(3) of the Land Acquisition Ordinance by the second respondent directing the applicants and the occupants of the lands to vacate the same by June 2023 and thus an application for stay of the eviction notices were filed ('the stay application').

Held, granting the leave application and disallowing the stay application:

(1) The applicants were not barred from seeking a judicial review as they had a real and genuine interest on the acquisition of the lands given that the applicant was entitled to a compensation and that the second applicant had an equitable right vis a vis the first applicant arising from the asset charges. It could not be gainsaid that the second applicant represented the interests of a person aggrieved ie Maybank Trustees Bhd. It was not necessary for the applicants to establish a statutory right to the lands in order to meet the requirements of locus standi. Even if the asset charges supposedly ceased to have legal effect once the lands were acquired, the applicants' rights for a share of the compensation, whether under statute or common law, undoubtedly subsisted. The applicants had a genuine interest and therefore, had locus standi (see paras 21 & 26–27).

(2) There were issues that required a full hearing and the applicants had an arguable case. The absence of the words 'illegality', 'irrationality' and 'procedural impropriety' in the affidavit in support was not a ground to defeat a judicial review application at leave stage. At this stage, prima facie the pleaded facts in the present case were sufficient to establish one of the grounds. The burden was on the applicants to establish it at the substantive stage (see paras 33 & 37).

(3) There was no appeal procedure for land acquisition aside from the statutory mechanism to obtain and assess compensation. The existence of an avenue to obtain compensation for compulsory land acquisition did not preclude a landowner from seeking relief through judicial review. The assessment of compensation pursuant to land acquisition and the challenge against the land acquisition itself were two separate matters. Therefore, the applicants were not precluded from applying for judicial review (see paras 39–40).

(4) The Attorney General's Chambers ('AGC') indicated that they had no objection to the leave application. The non-objection by the AGC for leave to be granted was noteworthy and carried weight. Even more so given that the AGC had been privy to the factual assertions and arguments made from both sides throughout the proceedings. Therefore, leave should be granted for the matter to be resolved at full hearing (see paras 41 & 43–44).

(5) No injunction may be granted against the government at all. In the stay application, prayers 1 and 4 were obviously injunctions as they acted in personam. Prayer 5 was a bit too late in the day since the acquisition of the lands was already conclusive when the second publication of the declaration was made in the Gazette in accordance with s 3(3) of the Land Acquisition Ordinance. Regarding prayer 3, the applicants' contention that the eviction would jeopardise the employees of the first applicant who had occupied the lands for years had no legal basis. The rights of the first applicant's employees and their families to occupy the lands flow from the first applicant's title and ownership, and such rights existed only with the consent of the first applicant. The lands had been resumed to the State Government of Sabah. The fact that the first applicant's employees were occupying the lands since before the resumption of the lands did not justify a stay of the eviction orders. Therefore, prayer 3 could not stand. For prayer 2, the applicants contended that the Acacia trees that were being felled belongs to the first applicant as the trees were cultivated at the first applicant's costs and expense. A stay was not necessary as the applicants could be adequately compensated for the value of the timber. In the circumstances, prayer 2 also could not stand (see paras 65, 70, 72, 77, 79, 82–83 & 85).

[Bahasa Malaysia summary

Beberapa keping tanah ('tanah') telah diberi milik kepada pemohon pertama menurut perjanjian jualan saham antara Kerajaan Negeri Sabah dan Avenel Sdn Bhd, untuk jual beli ekuiti dalam pemohon pertama ('perjanjian'). Perjanjian tersebut membawa kepada pelaksanaan beberapa siri perjanjian lesen kayu balak oleh Kerajaan Negeri Sabah dan pemohon pertama. Pemohon pertama kemudian mencipta satu cagaran khusus yang didaftarkan ke atas tanah-tanah tersebut memihak kepada Maybank Trustees Bhd serta cagaran tetap aset peminjam dan cagaran semasa aset peminjam, dan cagaran tetap aset peminjam kedua serta cagaran semasa aset peminjam kedua ('cagaran aset'). Berkaitan dengan cagaran aset tersebut, pemohon kedua sebagai ejen jaminan bersama, telah dilantik oleh Maybank Trustees Bhd untuk bertindak sebagai penerima dan pengurus terhadap aset tetap dan semasa pemohon pertama. Pada tahun 2021, perjanjian lesen kayu balak telah ditamatkan oleh responden keempat. Pemohon pertama juga telah digulungkan oleh perintah Mahkamah Tinggi dan seorang penerima rasmi telah dilantik. Pemohon kedua menulis kepada penerima rasmi untuk memperoleh kebenaran untuk terus bertindak sebagai penerima dan pengurus bagi memulakan prosiding menurut s 386(1)(c) Akta Syarikat 2016 dan kebenaran yang diminta telah diberikan. Kerajaan Negeri Sabah kemudiannya mengeluarkan pemberitahuan untuk mengambil semula tanah tersebut bagi tujuan awam dan pemberitahuan Warta untuk tanah-tanah tersebut telah diterbitkan. Oleh itu, permohonan kebenaran untuk semakan kehakiman telah difailkan oleh pemohon ('permohonan kebenaran'). Pada Mei 2023, notis pengusiran telah dikeluarkan

di bawah s 3(3) Ordinan Pengambilan Tanah oleh responden kedua yang mengarahkan pemohon dan penghuni tanah tersebut untuk mengosongkannya menjelang Jun 2023 dan oleh itu satu permohonan untuk penangguhan notis pengusiran telah difailkan ('permohonan penangguhan').

Diputuskan, membenarkan permohonan kebenaran dan tidak membenarkan permohonan penangguhan:

(1) Pemohon tidak dihalang untuk memohon semakan kehakiman kerana mereka mempunyai kepentingan sebenar dan tulen terhadap pengambilan tanah tersebut memandangkan pemohon berhak menerima pampasan dan pemohon kedua mempunyai hak ekuiti berhubung dengan pemohon pertama yang timbul daripada cagaran aset. Tidak boleh dinafikan bahawa pemohon kedua mewakili kepentingan orang yang terjejas iaitu Maybank Trustees Bhd. Tidak perlu bagi pemohon untuk membuktikan hak statutori kepada tanah tersebut untuk memenuhi keperluan locus standi. Walaupun cagaran aset sepatutnya tidak lagi mempunyai kesan undang-undang sebaik sahaja tanah itu diperolehi, hak pemohon untuk mendapatkan bahagian pampasan, sama ada di bawah statut atau undang-undang am, tidak diragukan lagi masih wujud. Pemohon mempunyai kepentingan sebenar dan oleh itu, mempunyai locus standi (lihat perenggan 21 & 26–27).

(2) Terdapat isu-isu yang memerlukan perbicaraan penuh dan pemohon mempunyai kes yang boleh dihujah. Ketiadaan perkataan 'kepenyalahan undang-undang', 'tidak rasional' dan 'ketidakpatuhan prosedur' dalam afidavit sokongan bukanlah alasan untuk menolak permohonan semakan kehakiman di peringkat kebenaran. Pada peringkat ini, secara prima facie fakta-fakta yang diplid dalam kes ini adalah cukup untuk mewujudkan salah satu alasan. Beban adalah pada pemohon untuk membuktikannya pada peringkat substantif (lihat perenggan 33 & 37).

(3) Tiada prosedur rayuan untuk pengambilan tanah selain daripada mekanisme statutori untuk mendapatkan dan menilai pampasan. Kewujudan saluran untuk mendapatkan pampasan untuk pengambilan tanah wajib tidak menghalang pemilik tanah daripada mencari relif melalui semakan kehakiman. Penilaian pampasan menurut pengambilan tanah dan cabaran terhadap pengambilan tanah itu sendiri adalah dua perkara yang berasingan. Oleh itu, pemohon tidak dihalang daripada memohon semakan kehakiman (lihat perenggan 39–40).

(4) Jabatan Peguam Negara ('JPN') menunjukkan bahawa mereka tidak mempunyai bantahan terhadap permohonan kebenaran. Ketiadaan bantahan oleh JPN untuk memberikan kebenaran adalah penting dan membawa berat. Lebih-lebih lagi memandangkan JPN telah terlibat dalam kenyataan fakta dan hujah yang dibuat oleh kedua-dua pihak sepanjang prosiding. Oleh itu, kebenaran harus diberikan untuk perkara

ini diselesaikan dalam perbicaraan penuh (lihat perenggan 41 & 43–44). A

(5) Tidak ada injunksi yang boleh diberikan terhadap kerajaan. Dalam permohonan penangguhan, permohonan 1 dan 4 jelas merupakan injunksi kerana ia bertindak secara peribadi. Permohonan 5 sudah terlambat kerana pengambilan tanah sudah disahkan apabila penerbitan kedua pernyataan dibuat dalam Warta mengikut s 3(3) Ordinan Pengambilan Tanah. Mengenai permohonan 3, hujahan pemohon bahawa pengusiran akan menjejaskan kakitangan pemohon pertama yang telah menduduki tanah tersebut selama bertahun-tahun tidak mempunyai asas undang-undang. Hak kakitangan pemohon pertama dan keluarga mereka untuk menduduki tanah tersebut berasal daripada hak milik dan pemilikan pemohon pertama, dan hak-hak tersebut hanya wujud dengan persetujuan pemohon pertama. Tanah-tanah itu telah dikembalikan kepada Kerajaan Negeri Sabah. Fakta bahawa kakitangan pemohon pertama sedang menduduki tanah tersebut sebelum pengambilan semula tanah tidak membenarkan penangguhan perintah pengusiran. Oleh itu, permohonan 3 tidak dapat dipertahankan. Bagi permohonan 2, pemohon berhujah bahawa pokok Akasia yang sedang ditebang adalah milik pemohon pertama kerana pokok-pokok itu ditanam dengan kos dan perbelanjaan pemohon pertama. Penangguhan tidak diperlukan kerana pemohon boleh diberi pampasan yang secukupnya untuk nilai kayu balak tersebut. Dalam keadaan ini, permohonan 2 juga tidak dapat dipertahankan (lihat perenggan 65, 70, 72, 77, 79, 82–83 & 85).] B C D E F

Cases referred to

Advance Synergy Capital Sdn Bhd (formerly known as Advance Synergy Capital Bhd) v The Minister of Finance, Malaysia & Anor [2011] 6 MLJ 376, CA (refd)

Badan Pengurusan Bersama Puncak Hijauan Setia (mewakili 434 pembeli/pemunya petak Pangsapuri Puncak Hijauan Setia) & Anor v Pentadbir Tanah dan Galian Pulau Pinang & Ors [2021] 1 MLJU 2104, HC (distd) G

Chong Chung Moi @ Christine Chong v The Government of the State of Sabah & Ors [2007] 5 MLJ 441, HC (not folld)

Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals [2023] 3 MLJ 829, FC (folld) H

Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185; [1987] CLJ Rep 110, SC (distd)

Government of Malaysia v Lim Kit Siang; United Engineers (M) Berhad v Lim Kit Siang [1988] 2 MLJ 12; [1988] 1 CLJ Rep 63, SC (folld) I

IB Capital Sdn Bhd v Ivory Indah Sdn Bhd & Anor [2022] 1 MLJ 860, CA (folld)

Kabra Holdings Sdn Bhd v Ahmad Shahlan & Ors and other persons unknown [1990] MLJU 8, HC (refd)

Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor [2014] 3 MLJ 145, FC (refd)
Pembinaan Nur Sejahtera Sdn Bhd v Kerajaan Malaysia & Anor [2021] MLJU 350; [2021] 1 LNS 290, HC (refd)
Professional Solutions Sdn Bhd v Pentadbir Tanah Seremban & Anor and another case [2019] 9 MLJ 1; [2019] 3 CLJ 253, HC (refd)
QSR Brands Bhd v Suruhanjaya Sekuriti & Anor [2006] 3 MLJ 164, CA (refd)
R v Secretary of State for the Home Department, ex p Rukshanda Begum [1990] COD 107 (folld)
Rekapacific Bhd v Securities Commission & Anor and other appeals [2005] 2 MLJ 269; [2005] 2 CLJ 108, CA (refd)
Sabah Forest Industries Sdn Bhd (receiver & manager appointed) & Anor v Chief Minister of the State of Sabah [2022] MLJU 3398, HC (distd)
Sabil Mulia (M) Sdn Bhd v Pengarah Hospital Tengku Ampuan Rahimah & Ors [2005] 3 MLJ 325; [2005] 2 CLJ 122, CA (refd)
Salim bin Ismail & Ors v Lebbey Sdn Bhd (No 1) [1997] 2 MLJ 1, CA (distd)
Sime Darby Plantation Bhd v Pengarah Tanah dan Galian Negeri Melaka & Ors [2020] 7 MLJ 776, HC (refd)
Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor [1998] 3 MLJ 289; [1998] 3 CLJ 85, CA (folld)
Superintendent of Lands and Surveys, Kuching Division & Ors v Kuching Waterfront Development Sdn Bhd [2009] 5 MLJ 607; [2009] 6 CLJ 751, CA (refd)
Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors (all acting as administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased) and another appeal [2009] 1 MLJ 289, CA (refd)
Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd [1995] 2 MLJ 442, CA (refd)
Superintendent of Land and Surveys, Bahagian Mukah & Anor v Bunyak Anak Gadin & Ors [2016] MLJU 1739; [2016] 5 CLJ 558, CA (refd)

Legislation referred to

Companies Act 2016 s 386(1)(c)
Government Proceedings Act 1956 s 29
Land Acquisition Ordinance (Cap 69) ss 2, 2(h), 3(3), 6(1)
Planning Rules 1970 r 5(3)
Rules of Court 2012 O 53, O 53 rr 3(5), (6), (7)
Specific Relief Act 1950 ss 44(1), 54(d), Chapter VIII

Jeyan Marimuttu (with Vanessa Marimuttu) (Marimuttu & Partners) in Judicial Review No BKI-25–36/12 of 2022 for the applicants.
S Vanugopal (S Vanugopal & Partners) in Judicial Review No BKI-25–5/1 of 2022 for the applicants.
Ahmad Fuad (with Wilson Chang and Syed Anwar Shariff Abdullah) (FT Ahmad

& Co); Fazriel Fardiansyah bin Abdul Kadir (Federal Counsel, Attorney General's Chambers) in Judicial Review Nos BKI-25–36/12 of 2022 and BKI-25–5/1 of 2022 for the respondents.

Amelati Parnell JC:

MATERIAL FACTS

[1] Two separate judicial reviews were filed in respect of the notice of compulsory acquisition for several pieces of land in the name of the first applicant (collectively referred to as 'the lands'). The issues and prayers sought are substantially similar and overlap with one another. the lands that form the subject matter of application No BKI-25–5/1 of 2022 will be referred to as the '5/1 lands', and the lands that form the subject matter of application No BKI-25–36/12 of 2022 will be referred to as the '36/12 lands', where the context requires.

[2] The lands were purportedly alienated to the first applicant pursuant to a share sale agreement dated 27 January 1994 between the State Government of Sabah and Avenel Sdn Bhd for the sale and purchase of 80% equity in the first applicant ('Avenel agreement').

[3] The Avenel agreement also purportedly led to the execution of the timber licence agreement dated 1 January 1996, timber (tree plantation) licence agreement dated 1 January 1996, supplemental agreement dated 15 January 2015 to timber licence agreement No JP(KSG) 108/96), and supplemental dated 15 January 2015 to timber (tree plantation) licence agreement No JP(KSG)107/96 by the State Government of Sabah and the first applicant (collectively referred to as the 'timber licence agreements'). The timber licence agreements were terminated by the fourth respondent on 1 September 2021. The termination is being challenged by the applicants and is currently pending in the Court of Appeal.

[4] The first applicant had purportedly created a specific registered charge on the lands in favour of Maybank Trustees Bhd for the sum of US$200m as well as a borrower fixed asset charge and a borrower current asset charge both dated 18 October 2010, and a second borrower fixed asset charge and a second borrower current asset charge both dated 17 October 2023 (collectively referred to as 'asset charges'). The asset charges were purportedly created upon reliance on the representations, warranties, undertakings and guarantees by the State Government of Sabah pursuant to the Avenel agreement.

[5] In connection with the asset charges, the second applicant as the joint security agent, was appointed by Maybank Trustees Bhd via letter dated

28 June 2017 to act as the receiver and manager of the fixed and current assets of the first applicant. The letters of appointment under the asset charges were purportedly served on the first applicant on 28 June 2017 and 14 December 2021, and lodged with the Companies Commission of Malaysia on 29 June 2017 and 16 December 2021.

[6] The first applicant was wound up by an order of the High Court of Sabah and Sarawak at Kota Kinabalu on 15 November 2021. An official receiver was subsequently appointed. The second applicant thereafter wrote to the official receiver for consent to continue to act as receiver and manager to initiate the present proceedings pursuant to s 386(1)(c) of the Companies Act 2016. The consent sought was granted on 13 December 2021.

[7] The State Government of Sabah later issued notifications for the purpose of resuming the lands for public purpose. The *gazette* notification for the 5/1 lands were published on 6 December 2021 and 9 December 2021. Whereas, the *gazette* notification for the 36/12 lands were published on 28 July 2022 and 4 August 2022, and served on the first applicant on 6 September 2022.

[8] Both judicial review applications in respect of the 5/1 lands and the 36/12 lands were filed on 21 January 2022 and 1 December 2022, respectively (collectively referred to as 'leave application').

INTERLOCUTORY PROCEEDINGS

[9] Sometime in August 2022, application No BKI-25–5/1 of 2022 was transferred to this court at the respondents' application in order for it to be heard together with all the cases concerning Sabah Forest Industries and the Government of Sabah including the application No BKI-25–36/12 of 2022.

[10] Sometime in May 2023, eviction notices were issued under s 3(3) of the Land Acquisition Ordinance by the second respondent, directing the applicants and occupants of the lands to vacate the same by 22 June 2023. An application for stay of the eviction notices were filed in both proceedings (encl 52 and encl 5, respectively, and collectively referred to as 'stay application') and pending disposal of the stay application, an ad interim stay was granted on 22 June 2023. The relevant portions of the order is reproduced below:

> IT IS HEREBY ORDERED THAT pending the disposal of the applicants' Notice of Application (Enclosure No 5)
>
> (1) Ad interim stay be granted against the execution of the Notices issued under Section 3(3) of the LAO by the second respondent on 24 May 2023, directing the applicants and all occupants of the said Lands to vacate the same by 22 June 2023 ('the Eviction Notices');

[11] The applicants later contend that despite having obtained and served the ad interim stay order on the respondents, the respondents' representatives and agents continue to enter the lands and 'undertake logging works and extraction of the Acacia timber to clear our the lands' which were allegedly planted by the first applicant at its own cost and expense.

[12] The applicants later filed an application for subsequential orders. The application for subsequential orders was directed to be heard together with the stay application and the leave application as the issues raised overlap.

LEAVE APPLICATION

Locus standi

[13] The first issue to be dealt with is the respondents' contention that the second applicant does not have locus standi to bring an action on behalf of the first applicant.

[14] The respondents argue that the asset charges were automatically extinguished once the acquisition becomes conclusive pursuant to the second publication of the declaration because of the operative phrase 'free from all encumbrances' appearing in s 3(3) of the Land Acquisition Ordinance. The respondents relied on the decision of this court in *Sabah Forest Industries Sdn Bhd (receiver & manager appointed) & Anor v Chief Minister of the State of Sabah* [2022] MLJU 3398 ('SFI v Chief Minister of Sabah') in support.

[15] The applicants argue that the respondents' reliance on the above decision is misplaced and the case should be distinguished as it involves choses in action which were not secured assets under a charge.

[16] In *SFI v Chief Minister of Sabah*, the applicants intended to file a judicial review primarily against the respondent's decision to terminate timber licence agreements which were purportedly charged as assets under a certain debenture. The applicants were caught by limitation under O 53 r 3(6) and had file an application to extend time under O53 r 3(7). The respondent objected on the grounds that second applicant, the receiver and manager of the first applicant, had no locus standi as only the liquidator is entitled to bring an action on behalf of the first applicant company.

[17] In the course of submissions, the applicants drew this court's attention to the Court of Appeal decision in Sabah Forest Industries Sdn Bhd v Pelangi Prestasi Sabah (Appeal No W-02(1M)(NCvC)-2082–11 of 2018) ('SFI v Pelangi Prestasi') which held that a receiver and manager has a right and

power under a debenture to bring proceedings in respect of charged assets. This court reproduced the followings pertinent extract from the notes of proceedings in the Court of Appeal:

> We find that based on the cl 9.2(j) of the fixed and current charges, the R&M has right and power to bring proceedings to get in the charges assets.

[18] This court then distinguished the Court of Appeal decision in *SFI v Pelangi Prestasi* from the circumstances in *SFI v Chief Minister of Sabah* as the latter did not involve charged assets but only choses in action.

[19] Coming back to the present case, the factual matrix is much more similar to the decision in *SFI v Pelangi Prestasi* as the present case involves the resumption or compulsory acquisition of lands which were charged under the asset charges. Lands are physical assets and are not considered choses in action. The ownership of land stands on a different footing compared to rights arising from a licence. Therefore, *SFI v Chief Minister of Sabah* is distinguishable and not applicable to the present case.

[20] In addition, no authorities on the interpretation of the phrase 'free from all encumbrances' were proffered to support the respondents' contention that the phrase has the effect of extinguishing a charge and subsequently vanquishing all rights arising therefrom. If that interpretation is correct, then it would lead to a despotic regime. Resumption of land as far as the Land Acquisition Ordinance (Cap 69) is concerned does not erase the rights attached to the compulsorily acquired land. In fact, the rights are recognised and this is why the Ordinance contains statutory mechanisms to grant compensation to person interested. The term 'person interested' was defined by s 2 of the Ordinance to mean 'every person claiming or entitled to claim compensation under this Ordinance' except for monthly tenants and tenants at will.

[21] So, even if the asset charges are extinguished by operation of law as contended by the respondents, the applicants are not barred from seeking a judicial review as they have a real and genuine interest on the acquisition of the lands given that the first applicant is entitled to a compensation and that the second applicant has an equitable right vis a vis the first applicant arising from the asset charges.

[22] The test to be adopted for locus standi is the 'adversely affected' test and this position was restated by the Federal Court in *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145 in the following terms at para 57 and 58:

> In view of the foregoing we are of the view that the view expressed by the Court of Appeal in *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* that the 'adversely

affected' test was a single test for all the remedies provided for under O 53 of the RHC is to be preferred. Hence the answer to the question posed in this appeal has to be in the negative. However, we are not prepared to accept the appellants' argument that the 'sufficient interest' test under O 53 r 3(7) of the English Supreme Court Rules 1977 is no different from the 'adversely affected' test under O 53 r 2(4) of the RHC as the two tests do not have the same meaning. Therefore, in determining the locus standi to sue, the court has to exercise caution in applying the English cases. *In our view for an applicant to pass the 'adversely affected' test, the applicant has to at least show he has a real and genuine interest in the subject matter. It is not necessary for the applicant to establish infringement of a private right or the suffering of special damage*. (Emphasis added.)

[23] The following passage from the Court of Appeal decision in *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164 at paras 16–17 is also instructive:

It is to rid this dichotomous approach which often produced injustice that O 53 in its present form was introduced. *There is a single test of threshold locus standi for all the remedies that are available under the order. It is that the applicant should be 'adversely affected'. The phrase calls for a flexible approach. It is for the applicant to show that he falls within the factual spectrum that is covered by the words 'adversely affected'. At one end of the spectrum are cases where the particular applicant has an obviously sufficient personal interest in the legality of the action impugned*. See, *Finlay v Canada* (1986) 33DLR 421. This includes cases where the complaint is that a fundamental right such as the right to life or personal liberty or property in the widest sense (see *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; [1996] 2 CLJ 771) has been or is being or is about to be infringed. In all such cases, the court must, ex debito justitiae, grant the applicant threshold standing. See, for example, *Thorson v Attorney General of Canada* [1975] 1 SCR 138. *At the other end of the spectrum are cases where the nexus between the applicant and the legality of the action under challenge is so tenuous that the court may be entitled to disregard it as de minimis. In the middle of the spectrum are cases which are in the nature of a public interest litigation*. The test for determining whether an application is a public interest litigation is that laid down by the Supreme Court of India in *Malik Brothers v Narendra Dadhich* AIR 1999 SC 3211, where, when granting leave, it was said:

Public interest litigation is usually entertained by a court for the purpose of redressing public injury, enforcing public duty, protecting social rights and vindicating public interest. The real purpose of entertaining such application is the vindication of the rule of law, effective access to justice to the economically weaker class and meaningful realisation of the fundamental rights. The directions and commands issued by the courts of law in public interest litigation are for the betterment of the society at large and not for benefiting any individual. But if the Court finds that in the garb of a public interest litigation actually an individual's interest is sought to be carried out or protected, it would be bounden duty of the court not to entertain such petition as otherwise the very purpose of innovation of public interest litigation will be frustrated. (Emphasis added.)

[24] The recent Federal Court decision in *Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals* [2023] 3 MLJ 829 is also instructive. It was argued that the class of persons who can establish locus standi ought to be limited. The appellant in that case submitted that since r 5(3) of the Planning Rules 1970 specifies that only three classes of persons are given notification and allowed to object to any proposed development, namely:

(a) registered owners of land adjoining the subject land;

(b) registered owners of land separated by any road, lane, drain or reserved land the width of which does not exceed twenty meters owners; and

(c) registered owners of land located within the distance of two hundred meters from the boundary of the land,

therefore, only persons coming within those categories have locus standi.

[25] The Federal Court rejected the argument and said this at paras 371–372:

> More significantly, however, we respectfully concur with the Court of Appeal that it is unnecessary for the respondents to fall within the categories of landowners set out in r 5(3) as *O 53 r 2(4) does not stipulate that the respondents need to establish a statutory right in order to meet the requirements of locus standi*.
>
> Order 53 r 2(4) lays down the basis or test for standing to sue, in that it stipulates that a person seeking the various reliefs under that provision should meet the threshold test of being 'adversely affected'. Whether a person is 'adversely affected' remains a question or issue for the determination of the court, having regard to the factual and legal matrix of the grievance. The legal matrix refers to such relevant legislation that is subsisting and applicable at the material time. (Emphasis added.)

[26] Without diving into the merits of the present case, prima facie the applicants have a genuine interest in the subject matter. The first applicant was the owner of the lands which were resumed to the State Government of Sabah. Whereas, the second applicant is the receiver and manager under the asset charges which confer rights and interests over the lands. It cannot be gainsaid that the second applicant represents the interests of a person aggrieved ie Maybank Trustees Bhd.

[27] Applying the aforementioned Federal Court decision, it is not necessary for the applicants to establish a statutory right to the lands in order to meet the requirements of locus standi. So, even if the asset charges supposedly cease to have legal effect once the lands were acquired, the applicants' rights for a share of the compensation, whether under statute or common law, undoubtedly subsists. The applicants have a genuine interest and therefore, have locus standi.

Frivolous and vexatious

[28] The next hurdle is for the applicants to show that there is an arguable case and that the claims are not frivolous or vexatious. On this point, the Supreme Court decision in *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 MLJ 442 adopted the following guidelines at p 449 ('R v Secretary of State Guidelines'):

> In *R v Secretary of State for the Home Department, ex p Rukshanda Begum* [1990] COD 107, the Court of Appeal in England correctly laid down guidelines to be followed by the court when considering an application for leave, in the following terms:
>
> (a) the judge should grant leave if it is clear that there is a point for further investigation on a full inter partes basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law;
>
> (b) if the judge is satisfied that there is no arguable case he should dismiss the application for leave to move for judicial review; and
>
> (c) if on considering the papers, the judge comes to the conclusion that he really does not know whether there is or is not an arguable case, the right course is for the judge to invite the putative respondent to attend and make representations as to whether or not leave should be granted. That inter partes leave hearing should not be anywhere near so extensive as a full substantive judicial review hearing. The test to be applied by the judge at that inter partes leave hearing should be analogous to the approach adopted in deciding whether to grant leave to appeal against an arbitrator's award … namely: if, taking account of a brief argument on either side, the judge is satisfied that there is a case fit for further consideration, then he should grant leave.

[29] The applicants' main ground is that the applicants had a legitimate expectation that the timber licence agreements would be continued and that the lands would not be acquired based on the warranties and guarantees purportedly given by the State Government pursuant to the Avenel agreement.

[30] Although not indicated directly, it appears from the averments in encl 3 (in particular paras 51–56, 67–68, and 75–84) that the applicants were under the impression that the State Government would assist the first applicant to continue to be a going concern pursuant to the Avenel agreements. Following that, the applicants also presumed that the timber licence agreements will be continued and this will allow the applicants to sell off the first applicants assets by a tender exercise. The purported existence of a letter by the Sabah Attorney General dated 19 May 2021 marked 'confidential' seemingly suggests this (see: para 51 of encl 3). The applicants contend that the State Government had reneged on its promise when it acquire the lands. Therefore, the acquisition, according to the applicants, was an unconscionable and unjust conduct.

[31] The applicants' other ground is that the acquisition was not done for a public purpose and is therefore, tainted with mala fide.

[32] Based on the evidence so far, the nature of the purported public scheme is for the purpose of Sustainable Forest Timber Utilisation, Processing, Management, Conservation, Research and Development Scheme, District of Sipitang (see: exh BLCM1 of encl 34). Although described in cryptic terms, the evidence at this stage shows that the scheme falls under public purpose as defined s 2(h) of the Land Acquisition Ordinance (Cap 69) which states as follows:

> for or in connection with the conservation, improvement or exploitation of natural resources.

[33] At face value, the acquisition cannot be said to be illegal as the purpose of the scheme falls squarely under s 2(h) of the Land Acquisition Ordinance (Cap 69). However, applying the *R v Secretary of State Guidelines* and considering the averments on the purported warranties and guarantees pursuant to the Avenel agreement as well as the existence of a letter by the Sabah Attorney General dated 19 May 2021 marked 'confidential', there are issues that require a full hearing and the applicants have an arguable case.

[34] I do not agree with the respondents' interpretation of the High Court decision in *Chong Chung Moi @ Christine Chong v The Government of the State of Sabah & Ors* [2007] 5 MLJ 441. The High Court never said that the words 'illegality', 'irrationality' and 'procedural impropriety' must be specifically written in the pleadings. The High Court only said that one of the three grounds must 'exist on the face of the record of the applicant's application, statement and affidavit'. These words do not shut the door for any one of the grounds to be established from the pleaded facts. Surely the High Court in that case had no intention to put up such a strict and punitive rule that would allow a litigant to suffer from his lawyer's ineptitude if the lawyer in advertently omits the words 'illegality', 'irrationality' or 'procedural impropriety' in the pleadings.

[35] In this regard, the following passage from the Court of Appeal decision in *Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors (all acting as administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased) and another appeal* [2009] 1 MLJ 289 at para 90 represents the legal position:

> The next question arising is whether the learned judge was correct in holding that the first defendant is a constructive trustee of the said shares. Counsel for the third, fourth and fifth defendants has also argued that the plaintiffs' claim against them as constructive trustees should be dismissed as the plaintiffs have failed to plead this. With regards to this, the learned judge was of the view that the essential ingredients

> to sustain an action against the first and the third, fourth and fifth defendants as constructive trustees for the shares that were transferred to them have been sufficiently pleaded. We have referred to that part of his judgment earlier in this judgment. We agree with his views on this issue. We would also like to add that a case on point is in *Re Vandervell's Trusts (No 2)*, *White and Ors v Vandervell Trustees Ltd* [1974] Ch 269, a Court of Appeal decision where it was held that where a party has set out in his pleadings not only the material facts on which he seeks to rely, but also the legal consequences which he seeks to draw from those facts, that party is not precluded at the hearing from seeking to draw different legal consequences from the facts pleaded.

[36] A more recent Court of Appeal decision in *IB Capital Sdn Bhd v Ivory Indah Sdn Bhd & Anor* [2022] 1 MLJ 860 also shared the same view. The following excerpt from para 331 is instructive:

> In response, counsel for the plaintiff said that the words equitable fraud need not be pleaded so long as all the relevant and necessary material facts to support such a plea are pleaded. He said (correctly in our view) that the plaintiff only needs to plead facts and not legal consequences.

[37] Thus, the absence of the words 'illegality', 'irrationality' and 'procedural impropriety' in the affidavit in support is not a ground to defeat a judicial review application at the leave stage. At this stage, prima facie the pleaded facts in the present case are sufficient to establish one of the grounds. The burden is on the applicants to establish it at the substantive stage.

Alternative remedy

[38] A further issue raised by the respondents is that the applicants have not exhausted the remedies under the Land Acquisition Ordinance (Cap 69). The respondents cited the decision in *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185; [1987] CLJ Rep 110 in support of its contention. That case is distinguishable on the facts as it involves a statutory appeal mechanism arising from the decision of the Inland Revenue Department.

[39] In contrast, there is no appeal procedure for land acquisition aside from the statutory mechanism to obtain and assess compensation. The existence of an avenue to obtain compensation for compulsory land acquisition therefore, does not preclude a landowner from seeking relief through judicial review. This is demonstrated in the observations made by the High Court in *Sime Darby Plantation Bhd v Pengarah Tanah dan Galian Negeri Melaka & Ors* [2020] 7 MLJ 776 which held as follows at para 41:

> To reiterate, it is my considered view that the present proceedings seeks the court's intervention to review over the decision by second respondent to acquire the

applicant's land pursuant to the Land Acquisition Act 1960, an administrative and public law decision which, has long been held to be justiciable and amenable for judicial review. See for example *Ringgit Exoticka Sdn Bhd v Pengarah Tanah & Galian Selangor & Ors* [2014] 8 MLJ 111.

[40] Clearly, the assessment of compensation pursuant to land acquisition and the challenge against the land acquisition itself are two separate matters. In the circumstances, the applicants are not precluded from applying for judicial review.

Non-objection by the Attorney General's Chambers

[41] In addition, the Attorney General's Chambers have indicated that they have no objection to the leave application.

[42] Ordinarily, a judicial review application is made ex-parte and only the Attorney General is given the locus standi to appear at the leave stage. The putative respondent is not entitled to appear and be heard at the leave stage unless invited by the judge to make representations. The law in this regard was made clear by the Court of Appeal in *Advance Synergy Capital Sdn Bhd (formerly known as Advance Synergy Capital Bhd) v The Minister of Finance, Malaysia & Anor* [2011] 6 MLJ 376 at para 21 and is alluded to in the *R v Secretary of State Guidelines* cited above.

[43] Corollary, the non-objection by the Attorney General's Chambers for leave to be granted is noteworthy and carries weight. Even more so given that the Attorney General's Chambers have been privy to the factual assertions and arguments made from both sides throughout the proceedings so far.

[44] For the foregoing reasons, leave should be granted for the matter to be resolved at a full hearing.

STAY APPLICATION INJUNCTION AGAINST THE GOVERNMENT

[45] The respondents contend that the stay application contains injunctive prayers or are in the nature of an injunction against the Government. It is submitted that no injunctions can be made against the Government.

[46] The applicants submit that the stay application is not an application for an injunction against the Government and is in fact an application for a stay.

[47] Before going into the applicants' stay application, it is crucial to review the current legal position. There are two provisions that bar injunctions against the Government.

[48] The first one appears in s 29 of the Government Proceedings Act 1956 which states:

> (1) In any civil proceedings by or against the Government the Court shall, subject to this Act, have power to make all such order as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:
>
> Provided that —
>
> (a) Where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and
>
> (b) In any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property or to the possession thereof.
>
> (2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.

[49] The term 'civil proceedings' is defined in s 2 of the same Act as follows:

> 'civil proceedings' means any proceeding whatsoever of a civil nature before a court and includes proceedings for the recovery of fines and penalties and an application at any stage of a proceeding but does not include proceedings under Chapter VIII of the Specific Relief Act 1950 [Act 137], or such proceedings as would in England be brought on the Crown side of the Queen's Bench Division.

[50] The above interpretation implies that injunctions against the Government may be granted in proceedings under Chapter VIII of the Specific Relief Act 1950 and in proceedings that would in England be brought on the Crown side of the Queen's Bench Division.

[51] The types of proceedings under Chapter VIII of the Specific Relief Act 1950 appear in sub-s 44(1) of the Specific Relief Act 1950 which states:

> 44 Power to order public servants and others to do certain specific acts
>
> (1) A Judge may make an order requiring any specific act to be done or forborne, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or any court subordinate to the High Court:
>
> Provided that —

A
(a) An application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;

(b) Such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;
B

(c) In the opinion of the Judge the doing or forbearing is consonant to right and justice;

(d) The applicant has no other specific and adequate legal remedy; and
C

(e) The remedy given by the order applied for will be complete.

[52] The expression 'proceedings on the Crown side of the Queen's Bench Division' was defined by Gopal Sri Ram JCA (as he then was) in *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289; [1998] 3 CLJ 85 ('Sugumar Balakrishnan') at p 302 (MLJ); p 104 (CLJ):
D

> It is trite that when the Government Proceedings Act was enacted in 1956, the only proceedings that were brought on the Crown side of the Queens Bench Division were applications seeking prerogative relief, such as certiorari, prohibition, quo warranto etc. By definition, therefore, such proceedings are not 'civil proceedings' for purposes of the Government Proceedings Act. Consequently, s 29 has not application to applications for certiorari and other prerogative relief.
E

[53] Similarly, in an appeal on the dismissal of applications for discovery and cross-examination in a judicial review application, Gopal Sri Ram JCA (as he then was) also observed as follows in *Rekapacific Bhd v Securities Commission & Anor and other appeals* [2005] 2 MLJ 269; [2005] 2 CLJ 108 at 114c:
F

> As a matter of procedural history, certiorari and the other prerogative remedies were proceedings on the Crown side of the Queen's Bench Division and were not therefore civil proceedings. Government Proceedings Act 1956, s 2 gives statutory recognition of this by excluding applications for prerogative remedies from the definition of 'civil proceedings' in that Act.
G

[54] These decisions imply that injunctions may be granted against the Government in judicial review proceedings.
H

[55] However, there is a second provision that bars injunctions against the Government and this is sub-s 54(d) of the Specific Relief Act 1950 which states:
I

> 54 Injunction when refused
>
> An injunction cannot be granted —
>
> (d) to interfere with the public duties of any department of any Government in

Malaysia, or with the sovereign acts of a foreign Government.

[56] A plain reading of the above provision infers that injunctions cannot be granted if it interferes with the performance of acts of public duty but it is arguable that injunctions can be made against the Government to restrain acts that are not acts of public duty.

[57] The Supreme Court in *Government of Malaysia v Lim Kit Siang; United Engineers (M) Berhad v Lim Kit Siang* [1988] 2 MLJ 12; [1988] 1 CLJ Rep 63 ('Lim Kit Siang') attempted to close the door shut when Salleh Abbas LP, speaking for the majority, held as follows at p 19 (MLJ); at p 67 (CLJ):

> This means that no injunction could be directly or indirectly issued against the Government or its officers. Similarly, the court has no jurisdiction to grant an injunction against a private litigant if the injunction would have the effect of restraining the Government or its officers from performing their functions. This has been the interpretation which has been placed by the Courts in England as well as in this country.

[58] The Court of Appeal decision in *Sabil Mulia (M) Sdn Bhd v Pengarah Hospital Tengku Ampuan Rahimah & Ors* [2005] 3 MLJ 325; [2005] 2 CLJ 122 ('Sabil Mulia') took a different approach when the learned Gopal Sri Ram JCA (as he then was) said that Salleh Abbas LP 'took the extreme view' in *Lim Kit Siang* and later observed as follows at 133h:

> In our judgment, the effect of current authority is that our courts have jurisdiction to grant interim and permanent injunctions against any servant of the Government. Accordingly, there was no jurisdictional bar to the High Court granting the instant appellant the injunction it sought against the first respondent the Director of the hospital in question. Since a Government servant or a member of the Cabinet may be restrained by injunction, it is strictly unnecessary from a practical point of view to decide whether the Government itself may be restrained in appropriate circumstances. Nevertheless, since the question is one which was argued before and ruled upon by the learned judicial commissioner, we think it behoves us to deal with the point. We accordingly proceed to consider the position of the second and third respondents, namely, the Ministry of Health and the Government of Malaysia. It has been settled since at least 1978 that s 29 of the 1956 Act does not prohibit the grant of temporary injunctions against the Government. In *Tengku Haji Jaafar & Anor v Government of the State of Pahang* [1978] 2 MLJ 105 it was held that the section 'does not take away therefore the right of the court to grant an interlocutory injunction'. This court in *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1; [2003] 3 CLJ 378 treated the ratio in *Tengku Haji Jaafar & Anor v Government of the State of Pahang* as settled law. Although the Federal Court reversed our decision in that case on the constitutional point, our judgment on this point was approved sub silentio. Accordingly, it is too late in the day to argue that s 29 bars the grant of an interlocutory or even an interim injunction against the Government.

[59] Gopal Sri Ram JCA (as he then was) also observed that the dissenting judges (Seah and Abdoolcader SCJJ) in *Lim Kit Siang* held that s 29 of the Government Proceedings Act 'did not bar the grant of interim injunctions against the Government or its officers' and that a 'differently constituted Bench of the Supreme Court (Lee Hun Hoe CJ (Borneo), Wan Suleiman and Wan Hamzah SCJJ) in the same case reversed the decision of the High Court at Penang refusing an interim injunction against United Engineers'.

[60] However, a latter Court of Appeal in *Superintendent of Lands and Surveys, Kuching Division & Ors v Kuching Waterfront Development Sdn Bhd* [2009] 5 MLJ 607; [2009] 6 CLJ 751 ('SLS v KWD') revived the position in *Lim Kit Siang*.

[61] SLS v KWD held that both s 29 of the Government Proceedings Act and sub-s 54(d) of the Specific Relief Act, when read together, provide that no injunction may be ordered against the Government, whether temporary or permanent.

[62] The current judicial trend also appears to lean in favour of *SLS v KWD* (see, inter alia: *Superintendent of Land and Surveys, Bahagian Mukah & Anor v Bunyak Anak Gadin & Ors* [2016] MLJU 1739; [2016] 5 CLJ 558 (CA) and *Pembinaan Nur Sejahtera Sdn Bhd v Kerajaan Malaysia & Anor* [2021] MLJU 350; [2021] 1 LNS 290 (HC) where the learned judge admitted to agreeing with the position in *Sabil Mulia* but felt bound by stare decisis to *Lim Kit Siang*).

[63] The reversion to *Lim Kit Siang* is understandable because *Sabil Mulia* is, with respect, somewhat flawed for leaving out an essential component that cannot be left to guesswork. In other words, there is a lack of definition, illustrations or examples of acts of public servants or department that are not acts of public duty under sub-s 54(d) of the Specific Relief Act.

[64] Without a clear definition, a public servant or department can simply claim that all their acts were done or are intended for the public good and are therefore acts of public duty which cannot be interfered with pursuant to sub-s 54(d). To attempt to prove otherwise is to undertake a Sisyphean task.

[65] Since *Lim Kit Siang* is the prevalent authority, no injunction may be granted against the Government at all.

Stay of decision or order

[66] On the other hand, a stay may be granted on the administrative decision

or order which is being challenged in the judicial review pursuant to O 53 r 3(5). A

[67] The difference between a stay and an injunction was discussed in the Court of Appeal in *Sugumar Balakrishnan* at p 302 (MLJ); p 103g (CLJ): B

> By contradistinction, an injunction is directed at a party to a proceeding restraining him from doing, or requiring him to perform, a particular act. Put another way, an injunction acts in personam, a stay does not. It follows that as a matter of law, an order for stay is not an injunction. Both the statutory provisions relied upon the learned judge (s 29 of the Government Proceedings Act and sub-s 54(d) of the Specific Relief Act) do not therefore curtail, in any way, the power conferred upon a High Court by O 53 r 1(5). C

[68] Applying the above principle, an examination of the relief sought in the stay application is necessary to determine whether they are in personam or directed at specific persons. If they are in personam, they are injunctive in nature. D

[69] The prayers in both encls 52 and 5 of the respective judicial review are substantially similar if not identical. For brevity, only the relevant portions of the prayers in encl 52 of the judicial review for the 5/1 lands are reproduced below: E

1) That pending the disposal of the applicants' Application for Judicial Review herein and any appeals therefrom, the respondents do refrain from entering the lands held under CL195312139, CL 195316244 and CL 195316280 ('the said Lands') to carry out one or more of the things set out in subsections (a) to (g) of Section 4 of the Land Acquisition Ordinance (Sabah Cap. 69) ('LAO'); F

2) That all further proceedings relating to the Acquisition of the said Lands be stayed and the status quo as regard to the said Lands be maintained until the determination of the applicants' application herein for a judicial review of the decisions of the respondents ('the said Acquisition'); G

3) That the execution of the Notices issued under Section 3(3) of the LAO by the second respondent on 24 May 2023, directing the applicants and all occupants of the said Lands to vacate the same by 22 June 2023 ('the Eviction Notices') be stayed until the determination of the applicants' application for a Judicial Review of the decision of the respondents, and any appeals therefrom; H

4) That the respondents, its agents, employees and or officers, be restrained and estopped from entering the said Lands to carry out one or more of the things set out in Sections 4 and 5 of the LAO; I

5) In the alternative to prayers 1, 2, 3 and 4 above, that the applicants' Notice of Application for Leave to Commence Judicial Review (Enclosure No 1)

A be heard together with the application herein and that the said Acquisition be stayed pending disposal of Enclosure No 1.

[70] Prayers 1 and 4 are obviously injunctions as they act in personam.

B

[71] Prayer 2 is a request to stay other related proceedings and to maintain the status quo. Prayer 3 forms the basis of the ad interim stay granted on 22 June 2023. Whereas, Prayer 5 is a request to stay the acquisition.

C **[72]** Prayer 5 is a bit too late in the day since the acquisition of the lands is already conclusive when the second publication of the declaration was made in the *gazette* in accordance with s 3(3) of the Land Acquisition Ordinance (Cap 69). In this regard, the case of *Badan Pengurusan Bersama Puncak Hijauan Setia (mewakili 434 pembeli/pemunya petak Pangsapuri Puncak Hijauan Setia) & Anor v Pentadbir Tanah dan Galian Pulau Pinang & Ors* [2021] 1 MLJU 2104 cited by the applicants ought to be distinguished as the acquisition in that case was not conclusive and in fact, 'the status of the proposed acquisition (was) unknown'.

D

E **[73]** That leaves us with prayer 2 and prayer 3.

Balance of convenience

F **[74]** Before determining if stay should be granted, a further point to consider is the balance of convenience.

[75] The applicants advance two main arguments with regard to the balance of convenience. These will be dealt with in turn.

G

[76] Firstly, the applicants contend that the eviction will jeopardise the employees of the first applicant who have occupied the lands for years.

[77] This ground has no legal basis. The draconian reality is that the rights of H the first applicant's employees and their families to occupy the lands flow from the first applicant's title and ownership, and such rights exist only with the consent of the first applicant. The first applicant has ceased to be an entity having being wound up. the lands have been resumed to the State Government of Sabah. The first applicant's employees are therefore unlawful occupants of I the lands. The fact that they have so occupied the lands for years do not create a right via adverse possession against the owner of the lands.

[78] In *Kabra Holdings Sdn Bhd v Ahmad Shahlan & Ors and other persons unknown* [1990] MLJU 8, an application was made by squatters of a piece of

land to set aside an order of possession granted by the court. In the alternative, the squatters prayed for a stay of the execution of the order. The High Court dismissed the application and said:

> The defendants can only have right to occupy the disputed land if, and only if, they had obtained the right to occupy the said land by way of the National Land Code. Adverse possession regardless of the period can never give the defendants the right to occupy the disputed land pursuant to ss 48 and 341 of the National Land Code ... Having found that they are illegal squatters I am bound to grant the order of possession to the plaintiff. There is no statutory or inherent power for me to stay the execution of the order.

[79] Although the factual matrix is dissimilar to the present case, the above case demonstrates that the fact that the first applicant's employees are occupying the lands since before the resumption of the lands do not justify a stay of the eviction orders.

[80] It is plain that the employees were only occupying the lands with the first applicant's consent. Their right to occupy the lands does not arise from the Sabah Land Ordinance (Cap 68) nor did they obtain any permission from the state authority. So, they cannot have adverse possession against the State Government of Sabah once the lands were resumed. Section 6(1) of the Sabah Land Ordinance (Cap 68) clearly states:

> Notwithstanding anything to the contrary contained in this Ordinance or in any written law relating to limitation of suits in force in Sabah, no unlawful occupation of State land or land reserved for a public purpose or residential purpose or occupation under temporary licence for however long a period shall establish any right, title or interest in State land or land reserved for a public purpose or residential purpose or create any right to demand a title to such land from the Government.

[81] Furthermore, the Court of Appeal decision in *Salim bin Ismail & Ors v Lebbey Sdn Bhd (No 1)* [1997] 2 MLJ 1 cited by the applicants is distinguishable because the occupants of the land in that case were permitted to occupy the land by the state authority. To belabour the point, there is no permission by the state authority in the present case. It is the first applicant that gave them permission to occupy the lands when it had the title and ownership of the lands. Thus, the first applicant's employees do not have a statutory right nor a common law right to occupy the lands.

[82] Therefore, prayer 3 cannot stand.

[83] Secondly, the applicants contend that the Acacia trees that are being felled belongs to the first applicant as the trees were cultivated at the first applicant's costs and expense.

[84] The applicants' main concern for raising the second ground is that the Acacia trees that are purportedly the first applicant's biological assets would be 'lost and gone to waste'. Clearly, the applicants' grievances in this regard are pecuniary in nature.

[85] A stay is not necessary as the applicants can be adequately compensated for the value of the timber. In *Professional Solutions Sdn Bhd v Pentadbir Tanah Seremban & Anor and another case* [2019] 9 MLJ 1; [2019] 3 CLJ 253, the High Court held:

> [46] In addressing the contentions in respect of special circumstances, first it is relevant to note the subject matter of the dispute. It is in respect of the land that is acquired. No matter how substantial is the value of the land, it is still in any event a matter with economic value. There is nothing more than pecuniary interest at stake.
>
> [47] Therefore even if the applicant is successful in the judicial review applications, damages should be adequate remedy, no matter how huge the amount might be. The special circumstances in essence in the mind of the applicant, still boils down to dollars and cents. In fact, in the judicial review applications, the court is empowered to award monetary compensation as stated under O 53 r 2(3) of the ROC.
>
> ...
>
> [49] Therefore, the special circumstances as understood by the applicant is far from being truly special circumstances, as even if the applicant is successful in the two judicial review applications, its grievance could still be addressed by awarding damages.

[86] In the circumstances, prayer 2 also cannot stand.

[87] There is another ground raised by the applicants which is the likelihood of dissipation of the lands to a third party. This relates to prayer 5 which is for a stay of the acquisition. To reiterate, it is already too late in the day as the acquisition is already conclusive.

[88] Hence, the balance of convenience tilts in favour of dismissing the stay application.

CONCLUSION

[89] The threshold for leave to bring judicial review is low. From the affidavit evidence, the applicants have established locus standi and that they have an arguable case that requires a full hearing. Therefore, leave ought to be granted and I so ordered.

[90] The prayers in the purported stay application contain injunctive prayers which ought to be disregarded as the decision in *Lim Kit Siang* remains as authority for the principle that no injunction can be granted against the Government.

[91] A stay on the acquisition is a futile exercise as the acquisition is already conclusive and complete. As for the prayers for stay of the eviction notices, the plight of the occupants who are the first applicant's employees do not justify a stay as they have no right in the lands given that they are unlawful occupants when the acquisition became conclusive. As for the timbers, the applicants are claiming for their value, thus these can be adequately compensated with damages. Therefore, a stay is not necessary, hence disallowed.

[92] Costs in the cause.

Leave application granted and stay application disallowed.

Reported by Nabilah Syahida Abdullah Salleh